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MATRIMONIAL PROPERTY

by

Joseph W. McKnight*

DURING the past year there were several decisions of great importance, and others which suggested significant questions yet to be settled. Though there has been no legislative activity in this period, some bills of vital concern to general family law will come before the legislature at the regular session of 1973. If adopted, they will have a significant impact on matrimonial property law.

I. CHARACTERIZATION

On several occasions the courts have stopped short of the issue of whether an interest is separate or community property by limiting their determination to whether it is even property for the particular purposes under discussion. *Nail v. Nail*¹ presented the question of whether the goodwill of the husband's medical practice constituted property that is subject to valuation and partition on divorce. The supreme court was pressed to find authority on which to rely, but concluded, on the basis of decisions in other jurisdictions,² that the goodwill of a professional practice is not a separate and distinct entity, and so much "attaches to the person of the professional" that it is not "an earned or vested property right . . . subject to division" on divorce.³ A related issue was raised in a federal estate tax case.⁴ The interest was a federal rice acreage allotment; the issue was the includability of a moiety of its value in the wife's estate for tax purposes. Though the Beaumont court of civil appeals had treated a rice acreage allotment as an intangible interest, the value of which was subject to consideration by a divorce court in making an equitable disposition of marital property,⁵ the federal court stressed the Beaumont court's conclusion that a divorce court "had no authority to *transfer* a rice allotment."⁶ The federal court concluded that the rice allotment acquired during the marriage of the decedent and her husband and continuing until her death did not constitute a community property interest includable in the wife's estate since she *owned* no interest in it as of the date of her death or, in the alternative, if she did own an interest, it terminated at her death.

In *Graham v. Franco*,⁷ decided on the same day as *Nail*, the Supreme Court of Texas also considered the issue of property *vel non*, but in a strikingly different context.⁸ In *Graham* the court examined the constitutionality of that

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¹ 486 S.W.2d 761 (Tex. 1972), *rev'g* 477 S.W.2d 395 (Tex. Civ. App.—Fort Worth 1972), which had been cited with approval in *Brooks v. Brooks*, 480 S.W.2d 463 (Tex. Civ. App.—Eastland 1972).

² *E.g.*, *Lilienthal v. Drucklieb*, 84 F. 918 (S.D.N.Y. 1898); *Hunt v. Street*, 182 Tenn. 167, 184 S.W.2d 553 (1945).

³ 486 S.W.2d at 763-64.

⁴ *Babb v. United States*, 349 F. Supp. 792 (S.D. Tex. 1972).

⁵ *Miguez v. Miguez*, 453 S.W.2d 514 (Tex. Civ. App.—Beaumont 1970), *noted in* McKnight & Raggio, *Family Law, Annual Survey of Texas Law*, 25 Sw. L.J. 34, 41 (1971).

⁶ 349 F. Supp. at 797 (emphasis added).

⁷ 488 S.W.2d 390 (Tex. 1972).

⁸ The case is among the first decided by the newly constituted Texas Supreme Court

portion of the Matrimonial Property Act of 1967⁹ in which the part of a recovery for a spouse's personal injuries that is not measured by earning power was defined as separate property. The court concluded that there is no conflict between the constitutional definition of separate and community property and that enunciated by the legislature in section 5.01(a)(3) of the Family Code.¹⁰ In reaching this conclusion the court finally resolved a long and sometimes acrimonious dispute which has raged in the legislature,¹¹ before the bar,¹² and among legal scholars.¹³ The basic characterization question arises out of the seemingly rigid constitutional definition¹⁴ of separate property as *only* that property acquired by spouses prior to marriage and that acquired during marriage by gift or inheritance, with the added conclusion that all else acquired during marriage is community property of the spouses. In construing this provision, enunciated in Castilian law and kept in force when the common law of England was adopted generally as the rule of civil decisions in 1840,¹⁵ the Texas Supreme Court considered whether the draftsmen of the constitution regarded recoveries for physical and mental injuries, loss of reputation, and like injuries as property, or as an independent interest vested in a particular spouse as an element of personal security. The court concluded that the draftsmen did not view such recoveries as property within the constitutional definition. This conclusion is consistent with that reached as a secondary proposition in two cases decided by the Texarkana court of civil appeals.¹⁶ In one of these cases¹⁷ the facts arose prior to the effective date of the 1967 Act, at which time statutory provisions attempting to make all of the wife's personal injury recovery her separate property had been declared unconsti-

and is heralded in some circles as marking the beginning of a new era of the court. See Mathews, *New Leadership for the Court*, 7 TRIAL LAWYERS F., Oct.-Dec. 1972, at 9.

⁹ TEX. REV. CIV. STAT. ANN. art. 4615 (1968), reenacted in 1969 as TEX. FAM. CODE ANN. tit. 1, § 5.01(a)(3) (Supp. 1972).

¹⁰ TEX. FAM. CODE ANN. tit. 1, § 5.01(a)(3) (Supp. 1972). The constitutional problem is analyzed by McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 26 SW. L.J. 31, 33-37 (1972), on which the court relied. 488 S.W.2d at 394.

¹¹ In one early instance the legislature attempted to deal with an element of the problem. See ch. 79, § 4, [1887] Tex. Laws 58, 59, 9 H. GAMMEL, LAWS OF TEXAS 856, 857 (1898). The legislature has twice attempted to deal with the matter generally: first, unsuccessfully, in ch. 54, § 1, [1915] Tex. Laws 103, reenacted as TEX. REV. CIV. STAT. ANN. art. 4615 (1925); and now, successfully, in ch. 309, § 1, [1967] Tex. Laws 736, codified at TEX. FAM. CODE ANN. tit. 1, § 5.01(a)(3) (Supp. 1972).

¹² The court overruled contrary dictum in *Ezell v. Dodson*, 60 Tex. 331 (1883), and the progeny of that dictum in *Dallas Ry. & Terminal Co. v. High*, 129 Tex. 219, 103 S.W.2d 735 (1937); *Missouri Pacific Ry. v. White*, 80 Tex. 202, 15 S.W. 808 (1891); and *Northern Tex. Traction Co. v. Hill*, 297 S.W. 778 (Tex. Civ. App.—El Paso 1927), *error ref.*

¹³ See Green, *The Community Property Defense in Personal Injury and Death Actions*, 33 TEXAS L. REV. 88 (1954); Green, *The Texas Death Act*, 26 TEXAS L. REV. 461 (1948); Huie, *Definition of the Wife's Separate Property*, 35 TEXAS L. REV. 1054 (1957); McKnight, *Personal Injury as Separate Property—A Legislative History and Analysis of the New Article 4615*, 3 TRIAL LAWYERS F., Sept.-Oct. 1968, at 7; McSwain, *The New Marital Property Statutes*, 2 FAMILY LAW NEWSLETTER No. 3 (1968), most of which were cited with approval by the court. 488 S.W.2d at 394.

¹⁴ TEX. CONST. art. XVI, § 15.

¹⁵ Act of Jan. 20, 1840, §§ 1, 3, [1840] Tex. Laws 3-4, 2 H. GAMMEL, LAWS OF TEXAS 177-78 (1898).

¹⁶ *Smith v. Smith & Rowe*, 473 S.W.2d 299 (Tex. Civ. App.—Texarkana 1971), *error ref. n.r.e., per curiam, on another ground*, 478 S.W.2d 81 (Tex. 1972); *Kirkpatrick v. Hurst*, 472 S.W.2d 295 (Tex. Civ. App.—Texarkana 1971), *rev'd on another ground*, 484 S.W.2d 587 (Tex. 1972). Both are commented on in McKnight, *supra* note 10, at 36-37.

¹⁷ *Kirkpatrick v. Hurst*, 472 S.W.2d 295 (Tex. Civ. App.—Texarkana 1971).

tutional because of overbreadth. The Texarkana court reasoned that the trial court might submit an issue to the jury along the lines of section 5.01(a)(3) on the assumption that the doctrine it enunciated legislatively in 1967 had been the law all along. The supreme court has since reached the same conclusion in a wrongful death case¹⁸ in which the heirs of the decedent were allowed to recover in spite of the contributory negligence of the surviving spouse. The decision in *Graham* did not rest on the 1967 statute but on the principle that the recovery for personal injury not measured by earning power is simply of its nature separate rather than community property.

In *Graham* the court went on to deal with the problem of characterizing the recovery for medical expenses. Acknowledging that there is room for difference of opinion on the point, the court concluded that "[t]o the extent that the marital partnership has incurred medical or other expenses . . . [t]he recovery . . . is community in character."¹⁹ Is the question therefore unresolved with respect to separate obligations for medical and like expenses? The amount of medical expense recovery is determined mainly by contractual or quasi-contractual amounts billed (or to be billed) by a physician and a hospital. In the absence of any contractual term that the individual or institution rendering the service will look to the separate estate of a particular spouse for payment, any debt that is contracted is a community debt and the obligation for discharge of that debt falls on the community subject to the management of the contracting spouse.²⁰ What the supreme court seems to suggest in *Graham* is merely that the recovery for medical expenses based on a separate or community loss is deemed, without proof to the contrary, to be a community recovery. The court seemed to leave open a means of demonstrating a separate recovery. After sustaining injury spouses will rarely have sufficient wits about them to contract with physicians or hospitals for repayment of services from the separate property of the injured spouse, and in most instances the physician or institution would be unwilling to enter into such an arrangement. But anticipating that one might at some future time be injured, one could have a standing agreement with a physician or hospital to accept these terms for payment for the injury of either spouse. If the spouse injured has no separate property with which to make payment, such funds may be borrowed on terms of separate repayment—or may be the subject of a gift of community property or an advancement of community property subject to reimbursement.

It has been established that insofar as a recovery for personal injury constitutes community property, suit may be brought by the injured spouse since the recovery is subject to his or her management.²¹ In *Jamail v. Thomas*²² the husband, acting without authority of his injured, estranged wife, hired an attorney on her behalf. Subsequently, the injured wife settled with her tort-

¹⁸ *Schwing v. Bluebonnet Express, Inc.*, 489 S.W.2d 279 (Tex. 1973).

¹⁹ 488 S.W.2d at 396 (emphasis added).

²⁰ *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881 (1937). Separate property liability, as well as that of the community property subject to the management of the other spouse, might also arise for the provision of a necessary.

²¹ *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424 (Tex. 1971).

²² 481 S.W.2d 485 (Tex. Civ. App.—Houston [1st Dist.] 1972).

feasor's insurer without consulting the attorney. The attorney then instituted an action against the husband alleging that he had filed suit in *their* behalf for recovery "for their losses and physical pain, mental suffering, impairment of the duties of a housewife and medical bills"²³ The court denied recovery on the ground that the husband could not, in an employment agreement with the attorney, assign a percentage of his wife's interest in her cause of action arising from her injury. The wife had the sole right of management, control, and disposition of the recovery including that for hospital and medical bills.²⁴

Although the court did not so treat the question before it, another determination as to whether an interest constituted property occurred in *Miser v. Miser*.²⁵ The issue was whether the husband's prospective, periodic, retirement pay, an interest unvested at the date of divorce, was divisible by the divorce court as a community property interest. The trial court concluded (and was sustained on appeal) that division could be made on the basis of a "when and if" order; *i.e.*, when and if the interest should vest, the wife would be entitled to a share of the proceeds, based on the proportionate part of the benefits earned during the marriage. The decision seems to allow the divorce court to exceed the proper exercise of its discretion. Within the holding in *Busby v. Busby*²⁶ the unvested interest does not seem to be any interest at all as of the date of divorce. Much of the difficulty in conceptualizing this problem is related to *Busby*, and the court in *Miser* emphasized that in *Busby* the Texas Supreme Court had relied on *LeClert v. LeClert*,²⁷ a New Mexico case in which the retirement rights had not vested at the date of divorce. If the conclusion in *Miser* is conceptually sound, a divorce court might also divide property against which a spouse has a claim of adverse possession as a naked trespasser "when and if" that right ripens. But such a conclusion seems manifestly unfair to a subsequent husband or wife of the acquiring spouse if the right vests during a subsequent marriage. In *Miser* the vesting of the right to retirement pay was anticipated to occur only about eighteen months after the effective date of the divorce decree. But if the date of potential vesting should occur many years hence, how can the divorce court properly exercise its equitable discretion if it cannot know the facts at that time? The ultimate difficulty may stem from the doctrine of inception of title and the cases involving a question of characterization when property was acquired by adverse possession.²⁸ Apparently, in these cases no thought was given to the

²³ *Id.* at 487.

²⁴ The court relied on the analysis in McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 22 Sw. L.J. 129, 132 (1968). See also *Herrington v. Pelkey*, 424 S.W.2d 507 (Tex. Civ. App.—Beaumont 1968), *error ref. n.r.e.*; *Miller v. Fitzpatrick*, 418 S.W.2d 884 (Tex. Civ. App.—Corpus Christi 1967), *error ref. n.r.e.*

²⁵ 475 S.W.2d 597 (Tex. Civ. App.—Dallas 1971), *error dismissed*.

²⁶ 457 S.W.2d 551 (Tex. 1970). Related points are discussed in *Badgett v. Erspan*, 476 S.W.2d 381 (Tex. Civ. App.—Fort Worth 1972), and Comment, *The Wife's Community Interest in Her Husband's Qualified Pension or Profit-Sharing Plan*, 50 TEXAS L. REV. 334 (1972).

²⁷ 80 N.M. 235, 453 P.2d 755 (1969).

²⁸ This line of decisions is rooted in 19th century holdings related to acquisition of title by sovereign-grant subject to a period of settlement. See, *e.g.*, *Strong v. Garrett*, 148 Tex. 265, 224 S.W.2d 471 (1949); *Creamer v. Briscoe*, 101 Tex. 490, 109 S.W. 911 (1908); *Mills v. Brown*, 69 Tex. 244, 6 S.W. 612 (1887); *Manchaca v. Field*, 62 Tex. 135 (1884).

notion of apportionment of the estate acquired between separate and community interests.²⁹ But since the doctrine of inception of title is given mechanical application, it must be remembered that the doctrine is keyed to the time of vesting. This approach affords no room for dealing with property rights that may vest sometime in the future. Without considering the line of cases on adverse possession, the Texas Supreme Court concluded in *Busby* that the nature of retirement benefits is characterized at the date of vesting of the benefits; their character is based on the marital status of the claimant at that time. As has been pointed out elsewhere,³⁰ this can lead to unjust and anomalous results and, curiously, equates the acquisition of the pension claimant to that of the naked trespasser, rather than the trespasser with color of title. But by any analysis, the projection of the rights of the spouse of the claimant (whose rights are unvested) would seem to intrude on the ripening of a presently non-vested right which at the date of the divorce decree is simply *nothing*.

Though *Busby* may be said to be a disability-retirement case as opposed to an ordinary retirement case, no particular point was made with respect to disability other than that it was the cause of retirement. In *Ramsey v. Ramsey*,³¹ a divorce case before the Eastland court of civil appeals, the court treated disability-retirement pay as separate property, considering it analogous to a personal injury recovery. But even if disability is the occasion or immediate cause of retirement, to show that all retirement pay is attributable to that disability requires proof to rebut the presumption of community. In its handling of another divorce case involving disability payments, the El Paso court of civil appeals simply adverted to *Busby*, in spite of an argument based on the federal supremacy doctrine.³² Except in *Ramsey*, no point has been made of a precise and discernible difference between community and separate interests in situations arising from ordinary retirement from military service and retirement from military service based on disability. There is, however, a difference in favor of the federal pensioner with respect to federal income tax treatment of a portion of the payments when retirement is based on disability.³³ But apart from that ground, it would seem difficult to make a showing of a separate character.

A proper application of the inception-of-title doctrine is found in *Parson v. United States*.³⁴ There the decedent, while residing in a common-law state, had acquired a number of life insurance policies before marriage and other

In applying the doctrine of inception of title to a situation of adverse possession, the trespasser with color of title acquires title from the date of his possession, whereas the naked trespasser acquires title only after the statute of limitations has run.

²⁹ See, e.g., *Love v. Robertson*, 7 Tex. 6 (1851).

³⁰ Note, *Military Retirement Benefits as Community Property—Busby v. Busby*, 25 Sw. L.J. 340 (1971).

³¹ 474 S.W.2d 939 (Tex. Civ. App.—Eastland 1972), error dismissed.

³² *Dominey v. Dominey*, 481 S.W.2d 473 (Tex. Civ. App.—El Paso 1972).

³³ No state appellate decision has pointed out the favorable federal income tax treatment of a pensioner in a federal disability-retirement case. See INT. REV. CODE of 1954, §§ 104(a)(4), 105(d), 122; Treas. Reg. §§ 1.122-1(b)-(d) (1970). See also the example of computation in 1 CCH 1973 STAND. FED. TAX REP. ¶ 1197B.

³⁴ 460 F.2d 228 (5th Cir. 1972), *rev'd in part* 308 F. Supp. 1159 (E.D. Tex. 1970), commented on in *McKnight & Raggio*, *supra* note 5, at 51-52.

policies during marriage, but all were acquired before the decedent and his wife established their domicile in Texas. The trial court held that the proceeds of the policies should be includable in the decedent's gross estate in the proportion that premiums paid from the decedent's separate property plus one-half the premiums paid from community property bore to the total amount of premiums paid. The Fifth Circuit reversed the trial court's equitable approach in favor of one based on the established doctrine of inception of title. All the property acquired prior to establishing domicile in Texas retained its ownership character at the time of acquisition, which in this instance was that of separate property. The proceeds of the policies belonged to the separate estate of the decedent at the time of his death and a right of reimbursement belonged to the community for premiums paid with community funds. A case involving correlative issues arose in a common-law state.³⁵ Applying its conflict-of-laws rules, the Missouri court determined that Texas law would characterize the nature of the personal property of a Texas spouse located on an estate by the entirety in Missouri, and that under Texas law such property was presumptively community property.³⁶

Another question was presented in *Parson* with regard to another life insurance policy. At the time of the purchase of that policy the decedent made an irrevocable assignment of it to his wife as a gift. The court held that, with respect to this policy, the wife was not only the beneficiary but also the owner of the policy, so that no interest in it was includable in the decedent-husband's gross estate.³⁷ Another case raised similar problems.³⁸ There the wife owned all the incidents of ownership of policies on the life of her husband. The couple was killed in a common disaster in which the wife predeceased the husband. The Commissioner took the position that on the wife's death the husband acquired the policies on his own life with the result that their value was includable in his gross estate. The Tax Court concluded, however, that under section 2042 of the Internal Revenue Code,³⁹ the husband did not possess incidents of ownership in the policies. At that point he merely had a right to the remainder of his wife's estate and had neither ownership of the policies nor substantive incidents of ownership.

Shades of *Freedman v. United States*⁴⁰ and *Prichard v. United States*⁴¹ appeared in *Bintliff v. United States*,⁴² in which the decedent had transferred all incidents of ownership of life insurance policies on his own life to his wife as

³⁵ *In re Perry*, 480 S.W.2d 893 (Mo. 1972).

³⁶ The difference between the Texas community property doctrine and that of another community property jurisdiction is discussed in a different context in *Fernandez-Cerra v. Commercial Ins. Co.*, 344 F. Supp. 314 (D.P.R. 1972). See also *Fink v. United States*, 454 F.2d 1387 (Ct. Cl. 1972), a revenue dispute involving Washington community property law in a situation in which Texas community property law would have rendered the same result. With respect to maintenance of a foreign residence for tax purposes, see *Carpenier v. United States*, 348 F. Supp. 179 (N.D. Tex. 1972).

³⁷ INT. REV. CODE of 1954, § 2042(2).

³⁸ *Estate of Dawson*, 57 T.C. 569 (1972).

³⁹ INT. REV. CODE of 1954, § 2042.

⁴⁰ 382 F.2d 742 (5th Cir. 1967), discussed in McKnight, *supra* note 24, at 133, and McKnight, *Matrimonial Property*, *Annual Survey of Texas Law*, 23 Sw. L.J. 44, 48 (1969).

⁴¹ 397 F.2d 60 (5th Cir. 1968), discussed in McKnight, *Matrimonial Property*, *Annual Survey of Texas Law*, 23 Sw. L.J. 44, 48-50 (1969).

⁴² 462 F.2d 403 (5th Cir. 1972).

her separate property,⁴³ so that the proceeds of the policies would not have been includable in his gross taxable estate. The Fifth Circuit determined, however, that to the extent that the wife (joined by the husband) had assigned part of the proceeds of the policy to discharge a community debt owed by the husband, one-half of the amount so discharged would be includable in the husband's gross estate.

Binliff also sheds light on gifts in contemplation of death with respect to premiums paid during the three years prior to the death of the decedent.

While the Government is incorrect in implying that life insurance is somehow always inherently purchased in contemplation of death within the intent of the Code provisions . . . it is correct in asserting that there is a presumption that all property transferred within three years of death for less than adequate and full consideration is transferred in contemplation of death and, therefore, includable in the decedent's gross estate. The burden is on the taxpayer to show that the dominant motive for the gift was life-related.⁴⁴

Here premiums paid were deemed to have been made in contemplation of death, as no life-related motive to their payment could be shown even though the decedent did not in any sense contemplate death and was killed in an air crash. It would be difficult to show that the payment of premiums on a life insurance policy has a life-related motive, other than disposing of the care and responsibility for the sums involved. But in *First National Bank v. United States*⁴⁵ another panel of the Fifth Circuit seemed to suggest that a life-motive might be more readily found in circumstances involving income producing property, although in the particular circumstances of that case they were not.

The courts also considered a number of miscellaneous transactions between spouses in characterizing particular property as separate or community. One of the basic rules in construing transactions between husbands and wives is that if the husband makes a conveyance of either separate or community property to his wife, it is deemed to be a gift to her in the absence of fraud, accident, or mistake.⁴⁶ The husband's purchase of property with separate property and the taking of title in the name of the wife or in their joint names produces a similar result. In *Hampshire v. Hampshire*⁴⁷ the husband bought land with his separate property and took title in the name of himself and his wife. In their divorce proceeding the wife testified that the husband had told her the transfer was a gift, although the husband denied that he made the statement. In the absence of any allegation of fraud, the presumption of gift to the wife of a half interest in the land prevailed.⁴⁸ The contention that a gift might be made to the community, however, was once again rejected in another case.⁴⁹ A further argument with respect to gifts of property was raised in *Wohlenberg*

⁴³ With respect to this issue, the court relied on its decision in *Parson. Id.* at 406.

⁴⁴ *Id.*

⁴⁵ 463 F.2d 716 (5th Cir. 1972).

⁴⁶ *Dalton v. Pruett*, 483 S.W.2d 926 (Tex. Civ. App.—Texarkana 1972).

⁴⁷ 485 S.W.2d 314 (Tex. Civ. App.—Fort Worth 1972).

⁴⁸ See *Patterson v. Metzger*, 424 S.W.2d 255 (Tex. Civ. App.—Corpus Christi 1967), commented on in McKnight, *supra* note 41, at 48.

⁴⁹ *Higgins v. Higgins*, 458 S.W.2d 498 (Tex. Civ. App.—Eastland 1970), noted in 23 BAYLOR L. REV. 303 (1971).

v. Wohlenberg.⁵⁰ The wife had opened a savings account in the names of both spouses, and only community funds (the sources of which were unspecified) were deposited. The husband had his name removed from the account, thus leaving only the wife's name on the account. However, this act alone was insufficient to rebut the presumption of community property.⁵¹

With respect to dealings between husband and wife, the concept of reimbursement for advancements on dissolution of the community increasingly has been seen as an unjust and out-dated concept in many instances. The measure of reimbursement of a separate estate that contributed to improvement of the community is the amount of investment or enhancement of value (whichever is less) at the date of the dissolution of the community. (The correlative doctrine for reimbursement of the community for separate enhancement is the same.) Injustice lies in the fact that reimbursement does not include interest from the date of advancement, so that in either an inflationary or deflationary economic situation the estate which contributes to the enhancement of the other stands to lose by passage of time. This loss is offset by any profits or enjoyment which may flow to the advancing estate from the estate which has been enhanced over the period of the life of the community. But as to the ultimate takers of the advancing separate or community estate substantial loss can result. One route of escape from this dilemma is to construe some transactions between spouses as loans rather than advancements. At a time when the husband was the manager of both separate estates as well as all the community, it was difficult (though not impossible)⁵² to think in terms of loans between husband and wife. But now that each has full contractual capacity, such an approach is both easily arrived at and perfectly reasonable. In *Padgett v. Padgett*⁵³ the question was whether the wife had lent money to her husband or had simply allowed him to use her separate property by way of advancement in the course of their marriage. She brought suit for her separate property as the subject matter of a loan and claimed interest against her deceased husband's estate from the time that the loan was made. The court pointed out that if she had advanced money to her husband, interest would run only from his death. But if she had made a loan (as the court concluded she had), interest would run from the date of maturity of the indebtedness. Construing such transactions as loans rather than advancements provides for interest and thus disposes of most of the problems of inflation. The statute of limitation poses a substantial barrier to this approach. Here the transaction occurred prior to 1968 when coverture tolled the statute of limitation with respect to claims of married women,⁵⁴ and the husband had also acknowledged the indebtedness

⁵⁰ 485 S.W.2d 342 (Tex. Civ. App.—El Paso 1972).

⁵¹ Also in issue was the unresolved question of the characterization of stock dividends on stocks which were separate property. It was not proved that the particular shares in issue were all declared on the separate stock and hence the presumption of community prevailed. There is no holding by the Texas Supreme Court that stock dividends on separate stock are separate property if declared from capitalized surplus and that conclusion would seem to be contrary to principle. *But see* *Tirado v. Tirado*, 357 S.W.2d 468 (Tex. Civ. App.—Texarkana 1962), *error dismissed*. No point of error was taken on this issue, however.

⁵² *See* *Sparks v. Taylor*, 99 Tex. 411, 90 S.W. 485 (1906); *Ryan v. Ryan*, 61 Tex. 473 (1884).

⁵³ 487 S.W.2d 850 (Tex. Civ. App.—Eastland 1972).

⁵⁴ TEX. REV. CIV. STAT. art. 5535 (1925).

in his will. The consequence of the reform of the statute of limitation (so that coverture no longer tolls the running of time against a married woman's claim)⁵⁵ is that married women must act to recover debts or achieve renewal of them from their husbands before the statutory time bars their claims. But when the debt is of the sort that would be barred by statute, the widow will assert her right as one for reimbursement since advancements do not become due until the community is dissolved, and at that time the statute of limitation begins to run.⁵⁶ A wise married woman may lend her husband money without fear of the consequences of her inaction if it is agreed that the loan does not become due until actual demand is made or until the dissolution of the community. If in writing, such a note would still not be negotiable, but none the less alienable.⁵⁷

In *Dalton v. Pruett*⁵⁸ it was the widow who relied upon a statute of limitation with respect to a conveyance made to her by her late husband. One issue was whether recited consideration in the husband's deed to his wife could be questioned. The court concluded, in effect, that the husband made a conveyance of his separate property to his wife. If the consideration paid was her separate property, the property took the same character. If there were no consideration, a gift to her separate estate could be presumed. But in any case the husband's heirs were said to be barred from contesting the matter by the four-year statute. The conclusion is dubious at best.⁵⁹ Characterization is often sought long after the facts governing the solution.⁶⁰ For example, in a recent instance⁶¹ claimants to the estate of their deceased mother sought to set aside a judgment alleged to have been rendered as a result of fraud fifty-two years earlier. The Waco court of civil appeals held that the 1919 judgment did not preclude the children from establishing the title of their mother.

The problems of commingling on dissolution of a community estate continually reoccur. In *McKinley v. McKinley*⁶² the problem was one of characterizing assets of an estate as separate or community property of the deceased husband. It was apparent that some of the funds might have been accumulated prior to the marriage of the decedent and, hence, were asserted to have been his separate property. But there was no way to distinguish that which might have been acquired prior to marriage from that acquired during marriage; therefore, the presumption of community of the whole prevailed. *In re Greer*⁶³ concerned a situation in which the husband attempted to show by mathematical calculation rather than tracing that a substantial separate estate which existed before the marriage still existed on dissolution. He showed

⁵⁵ Ch. 309, § 3, [1967] Tex. Laws 740 (codified at TEX. REV. CIV. STAT. ANN. art. 5535 (Supp. 1972)).

⁵⁶ *Burton v. Bell*, 380 S.W.2d 561 (Tex. 1964).

⁵⁷ TEX. BUS. & COMM. CODE ANN. §§ 3.104, 3.109 (1968).

⁵⁸ 483 S.W.2d 926, 928-29 (Tex. Civ. App.—Texarkana 1972).

⁵⁹ The authority relied on, *Fitchett v. Bustamente*, 329 S.W.2d 920 (Tex. Civ. App.—El Paso 1959), *error ref. n.r.e.*, involved a purported gift to the wife attacked on the ground of fraud.

⁶⁰ See, e.g., *Gulf Oil Corp. v. Shell Oil Co.*, 410 S.W.2d 260 (Tex. Civ. App.—Beaumont 1966), *error ref. n.r.e.*

⁶¹ *Crow v. Crow*, 485 S.W.2d 928 (Tex. Civ. App.—Waco 1972).

⁶² 483 S.W.2d 310 (Tex. Civ. App.—Tyler 1972).

⁶³ 483 S.W.2d 490 (Tex. Civ. App.—Amarillo 1972), *error dismissed*.

the value of his antenuptial worth and the net amount of increase on divorce. He asserted that the community would constitute the difference. Although this arithmetical approach has been successfully employed in a federal estate tax case,⁶⁴ it is not sufficient to rebut the presumption of the community status in Texas courts.⁶⁵

Transactions of spouses *inter alios* are subject to very different rules from those of the spouses *inter se*. In *Givens v. Girard Life Insurance Co.*⁶⁶ the husband had designated a non-relative as beneficiary of his life insurance policy. The premiums on the policy were paid by the husband's employer as part of his compensation. Since the policy was, therefore, a community policy, the naming of the beneficiary constituted a gift which under certain circumstances might be treated either as fraudulent, constructively fraudulent, or effective. Justice Guittard, speaking for the court, reviewed the status of the law in this area. He concluded that a gift to a relative would stand if adequate provision is made for the surviving spouse out of other property. But if a gift is made to an unrelated person, it is constructively fraudulent in the absence of special justifying circumstances. The court held that as a matter of law the surviving spouse should not have the burden of establishing fraudulent intent in order to protect her community property interest from abuse of the husband's managerial powers. Under such circumstances the wife is entitled to her share of the community and the gift of the other half stands. The court stressed its reliance on the Spanish writer Escriche⁶⁷ in concluding that "excessive or capricious gifts would be void without regard to whether the husband intended to defraud the wife" in such a situation.⁶⁸ Though the legislature failed to pass the proposal of the draftsmen of the Matrimonial Property Act of 1967 with reference to gifts of the community, the analysis offered by the court in *Givens* goes a considerable distance toward achieving the results proposed.⁶⁹

II. DIVISION ON DIVORCE

A basic Texas rule on dividing property on divorce is that the division shall be "just and right."⁷⁰ The question has been asked rhetorically whether fault continues to be a proper criterion for division when a divorce is granted on non-fault grounds.⁷¹ It has been suggested in another jurisdiction that fault as such may cease to be a proper criterion for fixing division of property or

⁶⁴ *Duncan v. United States*, 247 F.2d 845 (5th Cir. 1957).

⁶⁵ See *Tarver v. Tarver*, 394 S.W.2d 780 (Tex. 1965); *Kirtley v. Kirtley*, 417 S.W.2d 847 (Tex. Civ. App.—Texarkana 1967), *error dismissed*.

⁶⁶ 480 S.W.2d 421 (Tex. Civ. App.—Dallas 1972).

⁶⁷ DICCIONARIO DE LEGISLACIÓN ANOTADO 71 (1840).

⁶⁸ 480 S.W.2d at 425. With respect to trusts set up by the manager of particular community, see Comment, *How Much Control Is Too Much? Clarification and Limitation of the Illusory Trust*, 24 BAYLOR L. REV. 386 (1972). With respect to gift taxes attributable to a surviving spouse when the surviving spouse shares in the community bounty of the decedent, see *Kaufman v. United States*, 338 F. Supp. 23 (W.D. La. 1971), *rev'd*, 462 F.2d 439 (5th Cir. 1972).

⁶⁹ See McKnight, *Matrimonial Property Law Reforms*, 29 TEX. B.J. 1000, 1002, 1046 (1966).

⁷⁰ TEX. FAM. CODE ANN. tit. 1, § 3.63 (Supp. 1972).

⁷¹ McKnight & Raggio, *supra* note 5, at 42-43.

alimony if the dissolution of the marriage is not based on a finding of fault.⁷² But what of conduct of the spouses and other facts connected with the marriage, which might be sufficient to support a finding of fault?⁷³

The spouses are, of course, free to contract as they see fit with regard to future provisions for support of each other.⁷⁴ The terms of the court's "approval" of such contracts (except to trigger the effectiveness of the contract by its own terms) are essentially beside the point.⁷⁵ Since *Francis v. Francis*⁷⁶ Texas courts have examined various aspects of the sufficiency of consideration to support property settlement agreements on divorce.⁷⁷ The subject was further elucidated by the El Paso court of civil appeals.⁷⁸ The court found consideration for a binding agreement in the wife's acceptance of a division of property as requested by the husband. A party cannot seek revision of such an agreement following divorce without first offering to restore the benefits received under it or making a sufficient explanation for failure to do so.⁷⁹

The child support aspect of such settlements has been before the courts in two recent cases that define the contractual and non-contractual elements. As a matter of contract law the court cannot reduce the amount owed, but may reduce the amount required to be paid below that specified in the agreement for the consequences of contempt for disobedience.⁸⁰ The Dallas court of civil appeals concluded, however, that with respect to a property settlement agreement that one parent was entitled to claim the children as dependents for federal income tax purposes, the agreement cannot be subsequently altered.⁸¹ Though in many states the contractual support agreement is wholly merged in the judgment,⁸² in Texas the judgment may not affect the agreement. A provision in the property settlement agreement with respect to the payment of taxes on the homestead might be fixed, whether or not attributable in part to a provision for children. In the absence of agreement, the taxes fall on the spouse to whom the home is awarded.⁸³

⁷² *In re Williams*, 199 N.W.2d 339 (Iowa 1972); cf. Snyder, *Divorce Michigan Style—1972 and Beyond*, 50 MICH. STATE B.J. 740, 743-44 (1971).

⁷³ For observations on the new California statutes, see Goddard, *A Report on California's New Divorce Law: Progress and Problems*, 6 FAM. L.Q. 405, 413-15 (1972); Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 U.C.L.A.L. REV. 1306, 1316-17 (1970). See generally Clark, *Divorce Policy and Divorce Reform*, 42 COLO. L. REV. 403, 410 (1971); Note, *The No Fault Concept: Is This the Final Stage in the Evolution of Divorce?*, 47 NOTRE DAME LAW. 959, 972 (1972).

⁷⁴ See, e.g., *Shaw v. Shaw*, 483 S.W.2d 825 (Tex. Civ. App.—San Antonio 1972); *Sloan v. Sloan*, 474 S.W.2d 272 (Tex. Civ. App.—Waco 1971).

⁷⁵ *Republic Nat'l Bank v. Beaird*, 475 S.W.2d 344 (Tex. Civ. App.—Beaumont 1971), error ref.

⁷⁶ 412 S.W.2d 29 (Tex. 1967).

⁷⁷ See McKnight, *supra* note 10, at 31-32, in which recent literature and authorities are collected and commented on.

⁷⁸ *Lampkin v. Lampkin*, 480 S.W.2d 35 (Tex. Civ. App.—El Paso 1972).

⁷⁹ *Guion v. Guion*, 475 S.W.2d 865 (Tex. Civ. App.—Dallas 1972), error ref. n.r.e.

⁸⁰ *Alford v. Alford*, 487 S.W.2d 429 (Tex. Civ. App.—Beaumont 1972); *Myrick v. Myrick*, 478 S.W.2d 859 (Tex. Civ. App.—Houston [1st Dist.] 1972), error dismissed. An earlier dispute in *Myrick* is found in *Ex parte Myrick*, 474 S.W.2d 767 (Tex. Civ. App.—Houston [1st Dist.] 1971). See also Walley, *Contractual Aspects of Child Support Agreements*, 36 TEX. B.J. 107 (1973).

⁸¹ *Kolb v. Kolb*, 479 S.W.2d 81 (Tex. Civ. App.—Dallas 1972).

⁸² See, e.g., *Hoffman v. Commissioner*, 455 F.2d 161 (7th Cir. 1972).

⁸³ *Miller v. Two Investors, Inc.*, 475 S.W.2d 610 (Tex. Civ. App.—Dallas 1971), error ref. n.r.e.

With respect to the court's ultimate power to divide separate and community property on divorce, a clear interpretation of section 3.63⁸⁴ of the Family Code has not yet been made. Thus, a constitutional issue that has never been raised needs resolution. As section 3.63 now stands, it is a case of ancient oversight compounded by recent oversight. In 1840 the Congress of the Republic adopted the common law of England as the rule of decision in Texas.⁸⁵ But in so doing the Congress excepted the law of matrimonial property from the operation of the common law.⁸⁶ In addition to the wife's paraphernalia (as defined at common law), separate property was defined to include (1) all land and slaves of either spouse acquired before marriage, and (2) all land and slaves "as may be acquired by either party by gift, devise or descent"⁸⁷ during marriage. The rest of the spouses' property was defined as the community estate, which, therefore, comprised all significant personalty except slaves. In the following year the Congress enacted Texas' first divorce statute.⁸⁸ That act provided that divorce courts may "order a division of the estate of the parties . . . as . . . shall seem just and right" but that they should not "divest . . . title to real estate or to slaves," the significant elements of separate property as then defined.⁸⁹

The definition of separate property was altered in the Constitution of 1845 to its present form to include *all* property acquired before marriage and that acquired during marriage by gift, devise, or descent.⁹⁰ Though the formulation was then and still is in terms of the *wife's* separate property, the courts and subsequent legislatures have defined the separate properties of the spouses in the same terms.⁹¹ But by oversight the statute with respect to the division of property on divorce was left undisturbed and failed to exclude from the court's power of division that ordinary personalty which had been redefined as separate property if acquired before or during marriage. The original divorce statute of 1841 had forbidden division of all significant separate property, but when the definition of separate and, hence, community property was changed in 1845, the divorce statute was not made harmonious with the rest of the scheme.

Until January 1, 1970, the statute defining the powers of the divorce court to divide the property of the spouses retained the form of the prototype of 1841:⁹² to order a division of the estate of the parties as the court deems just and right without divestiture of title to realty. Until the supreme court finally resolved the issue in 1960 by holding that only divestiture of separate realty was forbidden, there was great difference of opinion whether community realty

⁸⁴ TEX. FAM. CODE ANN. tit. 1, § 3.63 (Supp. 1972).

⁸⁵ Ch. 12, § 1, [1840] Tex. Laws 3-4, 2 H. GAMMEL, LAWS OF TEXAS 177-78 (1898).

⁸⁶ Ch. 12, § 4, [1840] Tex. Laws 4-5, 2 H. GAMMEL, LAWS OF TEXAS 178-79 (1898).

⁸⁷ Ch. 12, § 4, [1840] Tex. Laws 4, 2 H. GAMMEL, LAWS OF TEXAS 178 (1898).

⁸⁸ Act of Jan. 6, 1841, [1841] Tex. Laws 19-22, 2 H. GAMMEL, LAWS OF TEXAS 483-86 (1898).

⁸⁹ *Id.* § 4.

⁹⁰ TEX. CONST. art. VII, § 19 (1845); TEX. CONST. art. XVI, § 15 (1876); see McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CAL. WEST. L. REV. 117, 132-33 (1971).

⁹¹ When the legislature again addressed the task of defining the community estate in 1848, it did so along the lines of the new constitutional definition of 1845. Ch. 79, §§ 1-5, [1848] Tex. Laws 77-78, 3 H. GAMMEL, LAWS OF TEXAS 77-78 (1898).

⁹² Ch. 130, § 1, [1921] Tex. Laws 251.

was also covered by the ban.⁹³ From an early time the supreme court had allowed partial though not complete divestiture of title to separate realty.⁹⁴ When the issue was finally resolved, the supreme court limited the divestiture proviso to separate real property, as the draftsmen of the statute of 1841 clearly had intended.

When section 3.63 was drafted and presented to the legislature in 1969, another oversight occurred. The proviso against divestiture of realty had been dropped out of the proposed revision, though the section was presented to the legislature as unchanged.⁹⁵ The meaning of the section has twice been the subject of comment by the courts,⁹⁶ but without discussion of the legislative history, and in neither instance did the court really purport to construe the section conclusively. In *Bryant v. Bryant* the court said that "the similarity in the wording of old Article 4638 . . . and the present Article 3.63 of the Family Code . . . is sufficient to cause this rule of law to be the same."⁹⁷ In *DePuy v. DePuy* Chief Justice Nye, in a concurring opinion, said "generally, separate property will be restored to its owner. Where personal property is involved, the court is vested with the wide discretion in making disposition whether it be separate or community."⁹⁸ No one has raised the constitutional issue: In the light of the constitutional definition can the divorce court in dissolving a marriage go beyond partition to change community property into separate property or convert the separate property of one spouse into that of the other?

It has been long established that the fee for the wife's attorney in a divorce proceeding may be a necessary. It has often been charged against the husband's share of the community.⁹⁹ This proposition dates back to a time when married women lacked a *general capacity* to contract with attorneys or anyone else.¹⁰⁰ Since 1963, however, married women have had general contractual power.¹⁰¹ No re-examination of the rule has been undertaken in the light of the wife's contractual power or her proceeding on no-fault grounds when the husband

⁹³ *Hailey v. Hailey*, 160 Tex. 372, 331 S.W.2d 209 (1960); see Comment, *Hailey, Hilley and House Bill 670—A Study in Partition and Survivorship in Texas Community Property*, 15 Sw. L.J. 613 (1961).

⁹⁴ *Fitts v. Fitts*, 14 Tex. 443 (1855).

⁹⁵ Title 1 of the Family Code was introduced early in the regular legislative session of 1969. An extensive hearing was had before the Judiciary Committee of the House of Representatives on March 11 and a less extensive one before the Jurisprudence Committee of the Senate on May 22. At neither of these was the section in issue discussed. The commentary of the draftsmen distributed to the members of the committee was simple and concise with respect to this provision: "This is a codification of present law." The bill was amended in the house committee and on the senate floor but there was no discussion of this provision. After the bill had been enacted by both houses, the senate sponsor asked that a thorough review of the bill be made to see whether there were any flaws of sufficient moment to cause him to ask the Governor to veto the bill. It was during this review that it was first noted that the provisions of § 3.63 did not precisely track those of its predecessor, art. 4638. Nevertheless, it was thought that these and some other flaws were not of sufficient magnitude to cause the Governor to veto the bill, and so it became law. It was assumed that an amendment could be offered at the anticipated special session so that this and other flaws might be cured before the bill became law on Jan. 1, 1970. But no change has yet been made.

⁹⁶ *DePuy v. DePuy*, 483 S.W.2d 883 (Tex. Civ. App.—Corpus Christi 1972); *Bryant v. Bryant*, 478 S.W.2d 602 (Tex. Civ. App.—Waco 1972).

⁹⁷ 478 S.W.2d 602, 605 (Tex. Civ. App.—Waco 1972).

⁹⁸ 483 S.W.2d 883, 888 (Tex. Civ. App.—Corpus Christi 1972).

⁹⁹ *Carle v. Carle*, 149 Tex. 469, 234 S.W.2d 1002 (1950).

¹⁰⁰ *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1964).

¹⁰¹ See, e.g., *Bellah v. First Nat'l Bank*, 474 S.W.2d 785 (Tex. Civ. App.—Eastland 1971), *error ref. n.r.e.*

is an unwilling or even innocent victim of marital dissolution. Apart from its reiteration of the traditional view, the only striking aspect of *Braswell v. Braswell*¹⁰² in this regard was the amount of the attorneys' fees awarded by the jury—an amount based in part on the success of the wife's attorneys. In two other cases the wife's attorneys initiated further proceedings for collection of their fees. In one the wife's attorneys brought suit against both former spouses.¹⁰³ The court held that the attorneys who participated in the trial and in reaching the settlement agreement were bound by the court's decree that each party should pay his or her attorneys, and the decree was *res judicata* of any claims against the husband or the wife to recover attorneys' fees as necessities. In the other case¹⁰⁴ the wife's attorneys were intervenors in the suit for divorce as parties and were awarded joint and several judgments against the wife and husband for their fees which were fixed by the court. In a subsequent suit by the attorneys against the husband for recovery of the fees, the court concluded that the original judgment was *res judicata* and that the attorneys were not entitled to a second judgment on the same debt.¹⁰⁵

In another instance,¹⁰⁶ the wife brought suit against the husband for her attorneys' fees. The trial court had appointed a receiver to liquidate the community estate, to pay the costs of the proceeding and certain outstanding community debts, and then to divide the amount remaining between the former spouses. Attorneys' fees were not fixed or awarded at the trial. After further proceedings and the lapse of seven years, during which there was an appeal and remand to the trial court on the issue of attorneys' fees, the trial court ordered the husband to pay the wife's attorneys' fees. In the interval half the proceeds from the sale of the community property had been disbursed to the ex-wife without any payment of outstanding debts. During the same period, the ex-husband had encountered many unforeseen expenses and financial difficulties. Under these circumstances the appellate court held that the husband should not be ordered to pay the wife's attorneys' fees as a matter of law. In effect, the trial court had abused its discretion.

Though the practice is somewhat uncommon, third parties may be joined in the proceedings for divorce in order to settle related property (and other) disputes between them and one or both of the parties to the divorce. But as has been recently demonstrated,¹⁰⁷ the venue statutes may not make effective joinder possible. In another case¹⁰⁸ an ex-husband brought suit against a third person, and the plaintiff's ex-wife sought to intervene against both parties. The plaintiff objected to being sued outside his county of residence. The court held, however, that he had waived his objection to venue by initiating the principal suit.

¹⁰² 476 S.W.2d 444 (Tex. Civ. App.—Waco 1972), *error dismissed*.

¹⁰³ Mullinax, Wells, Mauzy & Collins v. Dawson, 478 S.W.2d 121 (Tex. Civ. App.—Dallas 1972), *error ref. n.r.e.*

¹⁰⁴ Carter v. Leiter, 476 S.W.2d 461 (Tex. Civ. App.—Dallas 1972), *error ref. n.r.e.*

¹⁰⁵ The California Supreme Court has recently held that if an attorney is discharged without a fee, he is entitled only to the value of his services on *quantum meruit*. *Fracasse v. Brent*, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972).

¹⁰⁶ Smith v. Horton, 485 S.W.2d 824 (Tex. Civ. App.—Texarkana 1972), *error dismissed*.

¹⁰⁷ Schulz v. Schulz, 478 S.W.2d 239 (Tex. Civ. App.—Dallas 1972).

¹⁰⁸ May v. Little, 473 S.W.2d 632 (Tex. Civ. App.—El Paso 1971), *error ref. n.r.e.*

III. LIABILITY

Though the opinion in *Coghlan v. Sullivan*¹⁰⁹ is not altogether clear, the following facts seem to have given rise to the dispute. The husband and wife together operated a furniture store prior to the enactment of section 5.61 of the Family Code,¹¹⁰ which provides that community property subject to the sole or joint control of either spouse is liable for satisfaction of debts incurred by that spouse. But, there does not seem to have been any question that the whole estate of the couple was community and presumably wholly subject to the husband's liabilities.¹¹¹ Substantial debts were incurred by the husband in connection with the business, and judgments were obtained against him by his creditors. The couple was divorced in 1971, at which time they owned two community automobiles. On divorce one car was awarded to each spouse. The judgment creditors sought to levy execution on the husband's automobile. The husband in turn sought to enjoin execution, asserting that *both* cars were exempt: his under the family exemption statute¹¹² and hers under section 5.61(b) of the Family Code. The court concluded that the ex-husband's failure to assert his right to designate property subject to levy¹¹³ constituted a waiver of that right; therefore, the creditors might levy execution on his car. The court seems to have assumed: (1) that the family exemptions were applicable in spite of divorce; (2) that one of the cars was subject to the family exemption statute; and (3) that the exempt car was the one in the wife's name. The court then had to consider whether section 5.61 would provide any additional exemption of property from the creditors' claims. The court held that it did not. (The point might have been made more clearly, however, had the wife been attempting to defend against the levy of execution rather than the husband.) Assuming the applicability of the personal property family exemption statute as the court did, the result will not be the same in every normal marital situation. If the wife's car were purchased with community funds subject to her sole management, which it was not under the facts in *Coghlan*, she could claim it as exempt from her husband's creditors' claims.¹¹⁴ Thereafter, the husband could assert the family exemption for the community car subject to his sole management.¹¹⁵ But on the facts given the court seems to have gone astray in assuming the relevance of the family exemption statute. If no family existed with respect to either spouse (and the facts given revealed none), both cars should have been available to the creditors, as single persons are not entitled to claim an automobile. For purposes of the family exemption statute,¹¹⁶ the term "car-

¹⁰⁹ 480 S.W.2d 229 (Tex. Civ. App.—El Paso 1972).

¹¹⁰ Ch. 309, §§ 1, 6, [1967] Tex. Laws 736 (codified at TEX. FAM. CODE ANN. tit. 1, § 5.61 (Supp. 1972)).

¹¹¹ See *Moss v. Gibbs*, 370 S.W.2d 452 (Tex. 1963) (liabilities incurred prior to Jan. 1, 1968); TEX. FAM. CODE ANN. tit. 1, §§ 5.61(c), 5.22(b) (Supp. 1972) (liabilities incurred between Jan. 1, 1968, and the time of divorce); and *First Nat'l Bank v. Hickman*, 89 S.W.2d 838 (Tex. Civ. App.—Austin 1935), *error ref.* (liabilities incurred after the divorce in 1971).

¹¹² TEX. REV. CIV. STAT. ANN. art. 3832 (1966).

¹¹³ *Id.* art. 3859.

¹¹⁴ TEX. FAM. CODE ANN. tit. 1, §§ 5.61(c), 5.22(b) (Supp. 1972).

¹¹⁵ *First Nat'l Bank v. Hickman*, 89 S.W.2d 838 (Tex. Civ. App.—Austin 1935), *error ref.*

¹¹⁶ See *Palmer & Olds, Exempt Property*, in CREDITORS' RIGHTS IN TEXAS 23, 48 (J. McKnight ed. 1963), and authorities cited therein.

riage or buggy" includes a car, but for the single person the exemption for a "horse" does not extend even to a bicycle or a motorcycle.¹¹⁷ Quite apart from the need for updating the types of vehicles mentioned in the statute, the disparity of treatment between married and single persons seems long overdue for correction.¹¹⁸

Sections 5.61(b)(1) and (2) and its predecessors have been relied on in a long line of federal district court cases¹¹⁹ to protect community property subject to the management of one spouse from tax liability incurred by the other. But after the Ninth Circuit's decisions in *United States v. Overman*¹²⁰ and *In re Ackerman*,¹²¹ and the decision of the United States Supreme Court in *United States v. Mitchell*,¹²² it was apparent that the argument that these Texas statutes created something other than state exemptions could not stand for long. The anticipated ruling from the Fifth Circuit came in *Broday v. United States*,¹²³ in which a husband sought to resist collection of his wife's antenuptial income tax liability from community property subject to his management. The Revenue Service prevailed.¹²⁴

In 1970 the Dallas court of civil appeals refused to relieve an ex-husband of his obligation to pay contractual alimony.¹²⁵ He then sought relief through a petition in bankruptcy.¹²⁶ The bankruptcy court refused to grant a discharge of the indebtedness as the court apparently felt that it was nondischargeable because it was "for maintenance or support of wife."¹²⁷ That phrase clearly describes the situation, but in Texas an enforceable obligation of this kind only exists as part of a property settlement agreement—or, at any rate, a contractual liability not grounded in the support obligation. The court may look behind the agreement to determine whether it constitutes a compromise of support owed or a purchase of property rights.¹²⁸ Under Texas law it could only be the latter and should, therefore, be dischargeable.

¹¹⁷ *Id.* at 49.

¹¹⁸ See McKnight, *Modernization of Texas Debtor-Exemption Statutes Short of Constitutional Reform*, 35 TEX. B.J. 1137, 1141 (1972). Constitutional reform was achieved with respect to the real property exemption law in late 1972 by adoption of two amendments to TEX. CONST. art. VIII by which counties and cities are authorized to give tax relief to veterans and the elderly with respect to their homesteads. See also *Wikes v. Smith*, 465 F.2d 1142 (9th Cir. 1972), a case involving California law, in which the wife unsuccessfully asserted exempt status of an automobile purchased with money given to her by her husband, which was subject to creditors' claims.

¹¹⁹ See McKnight, *supra* note 10, at 42 n.91; McKnight, *supra* note 24, at 144 & nn.84, 85; McKnight, *Matrimonial Property, Annual Survey of Texas Law*, 21 SW. L.J. 39, 49 & nn.55-58 (1967).

¹²⁰ 424 F.2d 1142 (9th Cir. 1970).

¹²¹ 424 F.2d 1148 (9th Cir. 1970).

¹²² 403 U.S. 190 (1971).

¹²³ 455 F.2d 1097 (5th Cir. 1972).

¹²⁴ It is worth noting, however, that in *United States v. Hershberger*, 338 F. Supp. 804 (D. Kan. 1972), the court applied what might be described as the double-edged blade of *Overman* to allow the state homestead exemption to shield the wife's interest in the home and thereby protect it from levy for the husband's federal tax liabilities.

¹²⁵ *Smith v. Smith*, 460 S.W.2d 204 (Tex. Civ. App.—Dallas 1970).

¹²⁶ *In re Smith*, No. BK-3-2065 (N.D. Tex., Nov. 20, 1972).

¹²⁷ Bankruptcy Act § 17(a)(7), 11 U.S.C. § 35(a)(7) (1970). The full language of the Act is "for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female or for breach of promise of marriage accompanied by seduction, or for criminal conversation."

¹²⁸ *Goggans v. Osborn*, 237 F.2d 186 (9th Cir. 1956); *In re Avery*, 114 F.2d 768 (6th Cir. 1940); *Fernandes v. Pitta*, 47 Cal. App. 2d 248, 117 P.2d 728 (1941); *Tropp v. Tropp*,

One would not ordinarily encounter argument to the proposition that a conveyance of exempt property, regardless of the intent of the grantor, cannot be the subject of a conveyance in fraud of creditors, because creditors are precluded from reaching the property anyway. That argument was made recently in a rather unusual context.¹²⁹ In the property settlement agreement the wife had conveyed the property to the husband with the proviso that it would be reconveyed to her upon request. The ex-husband resisted compliance with the terms of the agreement on the ground that she had transferred it to him while they were married as part of a scheme to defraud her creditors. The husband's position was apparently that the property had never been a homestead or had lost its homestead character, though prior to the divorce the family had lived in the home and the wife and children continued to live there after the divorce. It is hardly surprising that the husband's contention failed. Transfers of other types of exempt property are likewise protected from the assertion of creditors' claims, though the transferor may have been insolvent and did not receive value in the transfer. The Fort Worth court of civil appeals could have rested its decision in *Parker Square State Bank v. Huttash*¹³⁰ on this proposition. In that case a creditor of a deceased, insolvent husband brought suit against his widow to subject the proceeds of insurance policies on the decedent's life to the payment of debts incurred by the decedent. Though the policies were taken out long prior to the decedent's incurring the debt to his creditor (and presumably while he was solvent), the creditor argued that the gift was not complete until the death of the insured and that, therefore, the payment of the proceeds to the widow constituted a voluntary transfer by an insolvent. The court rejected this contention on the basis of earlier authority that the date of the gift was the date on which the policy was purchased.¹³¹ The court seems to have overlooked another and more obvious ground for its conclusion, in that the insurance policies had been in effect for more than two years and were, therefore, exempt property under article 3832a.¹³² There does not seem to have been any assertion that the premiums paid while the decedent was insolvent constituted a source of recovery for the creditor.

The Texarkana court of civil appeals also had before it a case¹³³ involving a purported fraudulent conveyance of a homestead. There a rural plot of 250 acres was purportedly conveyed by the husband and wife at a time when it was apparent that the purpose was to defraud the husband's judgment creditor. The court concluded that the creditor was indeed defrauded and held in favor

129 Cal. App. 62, 18 P.2d 385 (1933); *McFarlane v. McFarlane*, 298 Mich. 595, 299 N.W. 728 (1941); *Wintrobe v. Connors*, 67 Ohio App. 106, 35 N.E.2d 1018 (1941); *Holloway v. Holloway*, 69 Wash. 2d 243, 417 P.2d 961 (1966). *But see In re Ridder*, 79 F.2d 524 (2d Cir. 1935), *cert. denied*, 297 U.S. 721 (1936); *Remondido v. Remondido*, 41 Cal. App. 2d 208, 106 P.2d 437 (1940); *Henson v. Henson*, 366 S.W.2d 1 (Mo. App. 1963); *D'Andria v. Hageman*, 253 App. Div. 518, 2 N.Y.S.2d 832, *aff'd*, 278 N.Y. 630, 16 N.E.2d 294 (1938); *Kadel v. Kadel*, 21 Ohio Misc. 232, 250 N.E.2d 420 (1969). Both Ohio decisions are somewhat idiosyncratic.

¹²⁹ *Morris v. Morris*, 482 S.W.2d 400 (Tex. Civ. App.—Waco 1972).

¹³⁰ 484 S.W.2d 429 (Tex. Civ. App.—Fort Worth 1972), *error ref. n.r.e.*

¹³¹ *Mitchell v. Porter*, 349 S.W.2d 785 (Tex. Civ. App.—Houston 1961), *error ref. n.r.e.*; *cf. Davis v. Prudential Ins. Co.*, 331 F.2d 346 (5th Cir. 1964).

¹³² TEX. REV. CIV. STAT. ANN. art. 3832a (1966).

¹³³ *Kyles v. Texarkana Prod. Credit Ass'n*, 474 S.W.2d 302 (Tex. Civ. App.—Texarkana 1971), *error ref. n.r.e.*

of the creditor, subject to the homestead right of the wife and children of the deceased husband. Emphasis was placed on the fact that the wife had failed to acknowledge the deed in the manner prescribed for homestead conveyance,¹³⁴ but the court could have rested its conclusion on the proposition that insofar as the property was exempt from creditors' claims it could not have been the subject matter of a fraudulent conveyance.

In *First National Bank v. McClung*¹³⁵ the bank had lent additional money against a homestead, on which the bank had a second lien, in order to prevent foreclosure of the first lien. In rejecting the bank's claim of a further lien, the court precluded it from stepping into the shoes of the first lienholder. Though the bank could have done so simply by purchase of the note from the first lienor, the independent advancement on the part of the bank would not constitute an additional lien on the homestead.¹³⁶

In another case¹³⁷ an attempt was made to fix a charge on homestead property for arrears in child support payments. In the divorce the husband was ordered to make child support payments and the wife was given occupancy of the homestead until the youngest child reached the age of twenty-one. The property was not dealt with otherwise. After the prescribed time had passed, a creditor of the husband sought partition of what had been the community homestead in order to reach the husband's interest. The divorced wife sought to fix on the husband's share a charge for unpaid child support.¹³⁸ Her claim was rejected, since the only remedy for recovery of delinquent child support payments, as the law now stands, is contempt. If the wife is given the remedies of a creditor in such a situation,¹³⁹ by proper prior action she may be able to fix a lien on the husband's share. But under the proposed statute no lien will arise by operation of law, nor could it arise by prior order of the divorce court in the event of delinquency.

The Tyler court of civil appeals has added its embellishment to the rule that a mobile home is a homestead when established as a home on land in which the owner maintains an interest.¹⁴⁰ The purchaser sued for inherent defects in the mobile home. The seller argued that if the home is a homestead, the measure of damages is that applicable to realty rather than to personalty. The court rejected this contention. The mere fact that the unit was intended to be fixed to land does not alter the applicable measure of damages for defects at purchase even though the defects are not discovered until the mobile home is attached to realty.

¹³⁴ See also *Sullivan v. Barnett*, 471 S.W.2d 39 (Tex. 1971).

¹³⁵ 483 S.W.2d 935 (Tex. Civ. App.—Amarillo 1972), error ref. n.r.e.

¹³⁶ See Davis, *New Money for Old Homesteads*, 35 TEX. B.J. 39 (1972).

¹³⁷ *Miller v. Two Investors, Inc.*, 475 S.W.2d 610 (Tex. Civ. App.—Dallas 1971), error ref. n.r.e.

¹³⁸ In the alternative, might she have asserted that the property was her homestead?

¹³⁹ See Smith, *The Family Code (Cont'd)*, 35 TEX. B.J. 1120 (1972).

¹⁴⁰ *Mobile Housing, Inc. v. Moss*, 483 S.W.2d 56 (Tex. Civ. App.—Tyler 1972).